

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
FRANK PIRONE, : 17-cv-03070-MKB-RER
Plaintiff, :
 :
- versus - : U.S. Courthouse
 : Brooklyn, New York
 :
CITY OF NEW YORK, : February 21, 2018
Defendant :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE RAMON E. REYES, JR.
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

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1 THE CLERK: Civil Cause for Status Conference,
2 docket number 17-cv-3070, Pirone v. City of New York.

3 Counsel for plaintiff, please state your name
4 for the record.

5 MR. FITCH: For plaintiff, Frank Pirone, Joshua
6 Fitch on behalf of the law firm of Cohen & Fitch, 233
7 Broadway --

8 THE COURT: Address is not necessary.

9 MR. FITCH: No? Okay.

10 THE COURT: We got it on the record.

11 MR. FITCH: Yes.

12 THE CLERK: Counsel for the defendants?

13 MR. FITCH: And I was going to say my
14 associate, Ilyssa Fuchs.

15 MS. FUCHS: Good morning.

16 THE COURT: Good morning.

17 THE CLERK: Sorry. Counsel for the defendants?

18 MS. NUNEZ: Yes, good morning.

19 Bridgette Nunez on behalf of the City of New
20 York, Ferrera and Stanley (ph.).

21 THE COURT: Good morning. Good morning, yes,
22 it still is morning.

23 Okay. If I am not mistaken, when we had our
24 telephone conference with Mr. Pirone, we went over the
25 basic facts a little bit.

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1 MS. NUNEZ: Yes, your Honor.

2 THE COURT: Since that time, an amended
3 complaint has been filed, correct?

4 MS. NUNEZ: Yes.

5 THE COURT: And served and we've got everybody
6 on the docket in the caption who needs to be there, yes?
7 You don't know?

8 MR. FITCH: I mean, assuming -- you know, I am
9 not going to impugn City counsel. I just -- according to
10 the City, this is everyone that should be here but I
11 probably will not know for sure until depositions take
12 place, I am imagining, your Honor.

13 THE COURT: Okay.

14 MR. FITCH: Just based on my own personal
15 experiences in these cases.

16 THE COURT: All right. Then we're going to get
17 into perhaps a problem because the statute of
18 limitations, if there are additional people that needed
19 to be added.

20 MR. FITCH: Well, that's sort of the reason why
21 I guess the good news for us in terms of the gift that
22 was given to us when we joined the case is that there is
23 this parallel state proceeding that has state claims
24 which would sort of us under a respondeat superior theory
25 if in fact we did not have all of the parties properly

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1 named in this action. So --

2 THE COURT: Are you counsel in that state
3 action now?

4 MR. FITCH: We've appeared in that action just
5 to keep it from being dismissed for his lack of
6 prosecution and getting a default against him but there
7 -- I mean, there's been an initial conference but there
8 has not been anything that has occurred in that case.

9 THE COURT: When was that initial conference?

10 MR. FITCH: A couple of weeks ago, I think,
11 your Honor.

12 THE COURT: Oh, okay.

13 MR. FITCH: We actually initiated it just to
14 get again get things sort of moving on, you know, in both
15 directions. So we -- you know, if possible not to bog
16 down two jurisdictions with the same matter.

17 MS. FUCHS: And that was on February 5th.

18 THE COURT: So he filed a notice of claim?

19 MR. FITCH: So as I understand it from prior
20 counsel, he had attorneys at one point who filed a notice
21 of claim, sat him for a 50-h.

22 MS. FUCHS: No, he may not have sat.

23 MR. FITCH: May not have sat? Filed a notice
24 of claim and then filed a state court action. At some
25 point, there was a motion to withdraw from his previous

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1 counsel stating that they had been unable to communicate
2 with him.

3 And then thereafter, I think he, not knowing
4 that had happened in that action, I think he received a
5 letter from them saying that he had -- they had
6 discontinued on his -- or discontinued as his attorneys
7 and I think he understood that to mean that that action
8 was gone, which is why he filed --

9 THE COURT: Filed the federal action.

10 MR. FITCH: -- pro se in federal court. So now
11 we're sort of picking up the pieces as it were.

12 THE COURT: Are you, Ms. Nunez, representing
13 the City -- the defendants in the state court action?

14 MS. NUNEZ: No, your Honor. That is assigned
15 to a different division, the Brooklyn tort division.

16 If I may, your Honor, as the defendants
17 asserted in their answer to the initial complaint, as
18 well as the amended complaint, and after conferring with
19 Brooklyn torts ACC, we haven't been able to find a notice
20 of claim that was filed. So that is -- that's definitely
21 an issue because we don't -- the comptroller doesn't have
22 a record of it.

23 THE COURT: Okay. I was going to suggest if a
24 notice of claim had been filed, that we just deal with it
25 here. I mean, it doesn't make sense to have two separate

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1 cases dealing with the same incident.

2 MR. FITCH: I've had this situation before,
3 your Honor. I was actually pleasantly surprised that the
4 Colorado Abstention Doctrine had already been dealt with
5 before I got into this case because I've litigated that
6 in the southern district before.

7 And that particular action what happened was
8 that the issues were joined -- all of the issues were
9 joined in one action. The only difference was in that
10 particular action, we still had time on the federal
11 statute of limitations which I think -- again, not
12 speaking for the City, I think for whatever reason they
13 felt okay about, there may be some sort of a mechanical
14 inability to sort of look at this the same way when
15 there's, you know -- in that particular action, I could
16 have just filed another complaint alleging -- in the same
17 venue, alleging federal causes of action. So I don't
18 think they saw it as the same situation.

19 And again, I am not -- I don't want to speak
20 for the City. I just -- experience tells me that this
21 might be a different scenario because we're no longer
22 timely on any claims.

23 THE COURT: Yeah. And especially because the
24 City can't find the notice of claim, right?

25 MS. NUNEZ: It is our position that it was not

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1 filed.

2 MR. FITCH: We have the file from prior
3 counsel. I mean, it indicates that in the complaint that
4 one was filed but we do have the file from prior counsel.
5 So as long as I can, you know -- I can verify --

6 THE COURT: Don't they have -- like when you
7 file a notice of claim, doesn't it get like a --

8 MR. FITCH: It's a PI number.

9 THE COURT: Yeah. And do you have that?

10 MR. FITCH: I don't know that we have a PI
11 number but my associate is telling me that she believes
12 that there is a notice of claim in the file that we
13 received from prior counsel. So I can, you know -- I can
14 double-check and to see what correspondence they have
15 from the City with respect to filing that notice of
16 claim.

17 MS. FUCHS: Because at least according to the
18 verified complaint they filed, it was filed with the City
19 on October 24th, 2014.

20 MR. FITCH: But having nothing to do with any
21 of those actions, your Honor, I can't really, you know --

22 THE COURT: Uh-hum.

23 MR. FITCH: -- I can speak sort of information
24 and belief but --

25 THE COURT: Well, let's see we can find the

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1 notice of claim, which means the state court action --
2 the state claims are alive, what would the City's
3 position be with respect to bringing those claims here,
4 permitting plan to file, this would be a second amended
5 complaint, to assert those claims.

6 MS. NUNEZ: I mean at this particular moment, I
7 wouldn't be able to -- I would have to confer with my
8 supervisor to determine what our position would be but
9 just -- you know, our position right now would probably
10 be on the grounds that it's time barred.

11 THE COURT: Now I mean, isn't the statute
12 tolled during the pendency of a case that was filed
13 timely in state court, it's tolled? So they satisfy the
14 statute of limitations.

15 MS. NUNEZ: I mean, your Honor, I would look
16 into it.

17 THE COURT: All right. Well, let's first --
18 why don't you first look at the file, find out if he can
19 get a PI number or you've got correspondence with the
20 comptroller indicating that one was filed. They can look
21 if they verify that it was filed, then the answer to the
22 question was whether you want to litigate in two forums
23 or one. I think it really comes down to that.

24 But all that would get you would be to get to
25 people who were not named on the federal claims.

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1 MR. FITCH: As I -- I mean, again, the state
2 claim is a little nondescript in terms of the particular
3 causes of action. I can sort of parse out what there was
4 in this case but yes, I believe so, your Honor. I don't
5 think there's anything independent in the state action.
6 My only concern would be really to the extent that I got
7 into depositions in this case and found out that there
8 was a third officer --

9 THE COURT: Who was beating on him or
10 something.

11 MR. FITCH: Yes. Then I would -- you know, I
12 would be committing malpractice if I withdrew the state
13 case without knowing that for sure.

14 THE COURT: Sure.

15 MR. FITCH: Not -- again, not impugning the
16 City. I just -- if I could only take the City's word
17 though, you know, my life would be much easier but --

18 THE COURT: All right. Well, what is this case
19 about? He got beat up by two police officers -- two or
20 more police officers.

21 MR. FITCH: Yes. Yes. I mean, there are
22 allegations that he was -- the one thing that I removed
23 the false arrest claim in this particular case based on
24 the Devon Peck (ph.) issue because he was admittedly in
25 this park, sitting on a bench and as I understand it,

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1 this particular park, you could not be in without a child
2 and this was, you know, a playground and knowing --
3 having kids of my own, I know that you're not -- as an
4 adult, you're not allowed to be in parks without a child
5 present. So there would have been --

6 THE COURT: Any?

7 THE COURT: Particular -- again, just knowing
8 Brooklyn -- the Brooklyn parks that I know of, there's
9 signs out there that basically say that you cannot be
10 there by yourself as an adult.

11 So I would be willing to concede there's at
12 least arguable probable cause for the arrest but this
13 case is really not about the false arrest, you know, as
14 it were in this case. This case is about once the --
15 whether or not there was probable cause to arrest and
16 conceding that there was, our client alleges that he was
17 punched in the face several times, shattering his jaw.
18 He went to the hospital, had surgery in the days
19 immediately following the incident and then went back
20 approximately two months later to have another surgery to
21 remove the plates and screws that were in his jaw and
22 perform further bone graft procedures.

23 And as I understand it from him -- and there
24 seems to be some intimation of this from the records that
25 there may be the potential for future surgeries in that

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1 respect, you know.

2 And obviously it's our position that that force
3 was excessive as a matter of law, regardless of any
4 probable cause they had. They did not need to use --
5 that was unreasonable under the circumstances.

6 And then afterwards, that they -- that the
7 officers made up a -- concocted a story about him
8 attempting to swallow drugs in order to cover up their
9 use of force.

10 THE COURT: Okay.

11 MR. FITCH: And there is also collaterally, a
12 claim -- it's also a route of the excessive force claim
13 and I dealt with it in the other case, actually where
14 your Honor was the magistrate, an unreasonable
15 handcuffing claim because the City has a policy in their
16 -- pursuant to their patrol guide, of handcuffing all
17 prisoners who are hospitalized and it's our position that
18 there is no -- that the policy does not comport with
19 constitutional requirements of when -- there's no
20 evaluation of when handcuffing is or is not necessary
21 based on the risk of flight, safety to the officers,
22 safety to other people. It's just if they're in a
23 hospital, police guides -- they're a hospital arrested,
24 they're handcuffed the entire time they're there, so --

25 Again, those claims I think are collateral to

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1 the major claim in this case which is the excessive force
2 but that's sort of the long and short of it.

3 THE COURT: Do we have the medical records yet?

4 MR. FITCH: Yes. We just actually provided the
5 complete set of medical records to defense counsel who I
6 believe prior to this, only had the incident records but
7 now there's the incident and follow-up --

8 THE COURT: Subsequent treatment.

9 MR. FITCH: -- which is about 500 pages or so.

10 THE COURT: All right. And have you provided
11 authorizations?

12 MS. FUCHS: Yes.

13 MR. FITCH: Yes.

14 THE COURT: All right. When is your client
15 going to get out?

16 MR. FITCH: He's --

17 THE COURT: I think I asked that on the phone
18 but I don't remember when.

19 MR. FITCH: He's in part of this work release
20 and probably my associate is better equipped to speak to
21 this particular issue, your Honor.

22 MS. FUCHS: So he's currently being housed at
23 Lincoln Correctional Facility, which is actually here in
24 the City. It's on 110th Street in Harlem. He's part of
25 the work release program.

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1 Currently, because he was just transferred, for
2 the next couple of weeks, he's not really allowed to go
3 out but after that, the restriction will be lifted. He
4 will be allowed out certain times during the day to look
5 for a job and once he finds a job, will be allowed out
6 during the day for work purposes. And then has to come
7 back and be locked in at night.

8 I spoke to a counselor who told me he also may
9 be available or able to attend legal conferences or
10 meetings with attorneys but they have to look as to
11 whether or not that qualifies as a reason why he can
12 leave the premises other than work.

13 THE COURT: Okay. So at the very least, there
14 will be some document discovery. You're going to need to
15 send the authorizations out, get medical records. I
16 assume the plaintiff is going to want the disciplinary
17 records, all that stuff --

18 MR. FITCH: Yes, your Honor.

19 THE COURT: -- that you normally get. Do you
20 have the underlying criminal documents from the criminal
21 case?

22 MR. FITCH: Yes, your Honor. We have the basic
23 criminal file.

24 THE COURT: All right.

25 MR. FITCH: As I understand it, there was

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1 undoubtedly IAB interviews and investigations, pertaining
2 to this specific case, regardless of any other
3 disciplinary issues with the officers.

4 THE COURT: Okay.

5 MR. FITCH: So there's certainly those
6 documents and recordings that we need.

7 THE COURT: And this is from 2014?

8 MR. FITCH: Yeah.

9 THE COURT: Okay. So you're going to want the
10 IAB written reports and the audio tapes which we know
11 it's standard practice to record interviews.

12 Ms. Nunez, just -- let me flag this as an issue
13 that I've dealt with in other cases. So there is a --
14 initially when there's a complaint, a -- sort of an area
15 IAB unit is contacted to interview the plaintiff -- the
16 complainant.

17 When it's an excessive force, from what I
18 understand, when there's -- when the allegation is
19 excessive force, that is handled by a separate IAB team.
20 I think it's Group 54, if I am not mistaken.

21 MR. FITCH: Yes.

22 THE COURT: That's what I have heard.

23 MR. FITCH: I think that's right, your Honor.

24 THE COURT: All right. So then everything
25 continues after that point under the Group 54

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1 designation. So what happens is sometimes the initial
2 group that goes out and takes the statement, that
3 information, while indicated somewhere in the electronic
4 records, because I know everything now is electronic.
5 Everybody is supposed to upload everything. Sometimes
6 that information gets lost, like in this other case,
7 there was the actual audio recording of the initial
8 interview of the plaintiff. Stayed with Group 9, which
9 was the group that initially went out but after Group 9,
10 found out, oh, it's an excessive force, Group 54 took
11 over but they -- Group 9 never uploaded the audio of the
12 interview and so we go through two plus years of
13 discovery with the plaintiff's counsel saying we want the
14 audio, we want the audio and the City saying there is no
15 audio. We checked with Group 54 and they didn't check
16 with Group 59, of course, when they deposed the -- the
17 Group 9 people, said of course I taped it. We tape every
18 interview and we had big problems and someone's gotten
19 sanctioned and now that's up with the district judge.

20 So don't rely on what some person in IAB is
21 telling you that's sitting behind a desk. Look to see
22 who conducted the interview, which police officer and
23 reach out to that person, if there's no audio tape in the
24 system and say did you audio. Look at your desk. Look
25 at -- you know, so just be careful.

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1 And it's not say that anyone is purposefully
2 doing anything to hide the ball or anything, but it just,
3 you know, it's a huge bureaucracy.

4 MR. FITCH: I know.

5 THE COURT: It's like one of the biggest
6 bureaucracies around and things fall through the cracks.

7 MR. FITCH: I always say assume the right
8 doesn't know what the left hand is doing.

9 THE COURT: What the left hand is doing, right.

10 All right. So we're going to want at least
11 that investigation and you're going to get the abstracts
12 of CCRB and IAB for all of the -- or indices or whatever
13 they call them, for counsel and you'll go through and
14 you'll find out which ones. Produce those unredacted and
15 if you don't have a confidentiality order -- I don't
16 think you do.

17 MR. FITCH: Not yet, your Honor.

18 THE COURT: Get one. I like them unredacted
19 because it takes another step out because invariably you
20 get a redacted one and you say oh, I don't know what -- I
21 want to see that. That looks interesting. And then I
22 have to -- you know, just give it unredacted. Following
23 my Frails (ph.) decision. You get what you get and if
24 you have any problems, you'll let me know.

25 You're going to need to send him to a

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1 maxillofacial --

2 MR. FITCH: That's right.

3 THE COURT: -- specialist.

4 MR. FITCH: That's exactly right.

5 THE COURT: And that might be problematic
6 because of his work release status.

7 MR. FITCH: I'm thinking, your Honor, when we
8 get to a -- if it pleases the Court, to do -- the idea
9 would be to do expert discovery after other fact
10 discovery is complete and perhaps by that time, you know,
11 having his availability is maybe less than an issue under
12 the work release.

13 THE COURT: Okay.

14 MR. FITCH: It's just a thought.

15 THE COURT: All right. Do you know how long he
16 is going to be on work release?

17 MR. FITCH: I know he maxes out -- if he didn't
18 get work release and he just sat in, he maxes out about a
19 year from now, so --

20 THE COURT: Okay.

21 MR. FITCH: So -- and I am guessing, your
22 Honor, to the extent that work release or the facility
23 needs an order to make them -- to cut through some of the
24 bureaucracy over there, your Honor would be inclined to
25 sign such an order.

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1 THE COURT: Yes.

2 MR. FITCH: Okay.

3 THE COURT: Currently, discovery is set to
4 close on June 1st. That's not going to be enough time.

5 MR. FITCH: It really sort of dependent on IAB
6 but in my experience, probably not. But maybe,
7 notwithstanding expert discovery, that might not be an
8 unreasonable deadline. It just depends on IAB. It's
9 certainly more than enough time to -- even with him being
10 in, to get three or four depositions conducted.

11 THE COURT: But you're going to want Ms. Nunez
12 before you depose him, to get the medical records
13 pursuant to the authorizations that you've been provided,
14 correct?

15 MS. NUNEZ: Yes, your Honor. They did provide
16 me with about 400 pages of medical records today. So I
17 will have an opportunity to review that, as well as the
18 ones that we do have.

19 THE COURT: All right. But you're going to
20 send those authorizations out because you want to double-
21 check to make sure you got everything that there is.

22 MS. NUNEZ: Correct, your Honor.

23 THE COURT: All right. And then you're going
24 to take his deposition. So look, I think it's unlikely
25 that you'll complete fact discovery by June 1st. But I

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1 am going to keep the schedule in place. We are supposed
2 to meet again on -- are we?

3 MR. FITCH: I didn't see it in the --

4 THE COURT: Yes, final pre-trial conference is
5 June 7th at 11:30 but I don't see a status conference.

6 THE CLERK: This is it.

7 THE COURT: This is it?

8 THE CLERK: Yes.

9 THE COURT: Yes, this is it.

10 MR. FITCH: I guess for -- it feels like a
11 preliminary conference --

12 THE COURT: Yeah.

13 MR. FITCH: -- probably because there was no
14 attorney on the other end.

15 THE COURT: Yeah. You know, let's do this
16 then --

17 THE CLERK: He was represented pro se when we
18 set that schedule date.

19 THE COURT: Yeah, let's do this.

20 (Pause)

21 THE COURT: Let us do this. I would like
22 status report on May 25th, a comprehensive status report.
23 So you folks get together, figure out what you're going
24 to tell me but I want to know what the status of
25 discovery is. We've done this, we've done that. We're

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1 going to do these other things on these dates.

2 And we would like to adjust the schedule
3 accordingly. All right? Including adjourning the June
4 7th, final pre-trial conference, if that's what you want
5 to do. We can keep -- you know, we'll keep June 7th in
6 place as a placeholder but if it's -- it doesn't make
7 sense to meet then, I don't want to just pull you in for
8 no reason. So I'll have to take your lead on that. All
9 right? Does that make sense?

10 MS. NUNEZ: Yes, your Honor.

11 MR. FITCH: Sounds good.

12 THE COURT: Have you had any discussions about
13 settling the case?

14 MR. FITCH: Very preliminarily, your Honor. I
15 have given the City a demand and given the severity of
16 the injuries, I am guessing it is probably going to take
17 Ms. Nunez some time to run that up the flagpole and
18 determine what their response, if any, is going to be.

19 THE COURT: No question that he was injured,
20 right?

21 MS. NUNEZ: No.

22 THE COURT: Okay. So this case at its heart
23 comes down to who you believe as to the necessity of the
24 force that was used because it's a broken jaw. You said
25 shattered.

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1 MR. FITCH: I mean, it was broken in several
2 places, as I understand it.

3 THE COURT: And is the contention that the
4 ground shattered his jaw or he was struggling and the
5 force was necessary?

6 MS. NUNEZ: There are entries in the medical
7 record that indicate that he impacted with the fence on
8 his face and yes, there is also the fact that he was
9 resisting arrest, so there was some sort of struggle that
10 ensued where he may have been injured as a result of
11 that.

12 THE COURT: Okay. It comes down to who you
13 believe and whether the force that was used was
14 commensurate with the -- I will use the word resistance
15 with a small "r". All right.

16 It shouldn't be too much of a trial. Really
17 three witnesses to speak on that, unless you have someone
18 else who remembers the incident, a parent perhaps who was
19 in the park.

20 MR. FITCH: To the extent the experts have
21 anything relevant to say about that --

22 THE COURT: That's true.

23 MR. FITCH: -- maybe --

24 THE COURT: That's true. Well, if you need my
25 help settling the case, you'll let me know, okay?

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MR. FITCH: Sounds good.

MS. NUNEZ: Thank you.

THE COURT: All right. off the record.

(Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 9th day of January, 2018.


Linda Ferrara

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